OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 13-04 March 19, 2013

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel /s/

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section

In late February, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, a primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As is the practice, I provided responses to questions that the Committee had submitted earlier in the year, collected from practitioners from across the country who appear before the Agency. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and the Agency's responses with you so that you can have the benefit of this important exchange. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses. The statistics and responses included are current as of the time of the meeting, unless otherwise noted.

During my tenure as Acting General Counsel, it is my intention to conduct the business of the Office of the General Counsel in an open and transparent manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee stated their appreciation to me of the open and constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to create those liaisons where they do not exist and to continue and broaden those relationships where they do. Constructive relations with representatives of both management and labor who appear before us will only improve the performance of our mission and provide better service to all Agency stakeholders.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

I. UNFAIR LABOR PRACTICES ISSUES

A. Deferral

The Committee is interested in the implementation of the deferral policy set forth in Memorandum GC 11-05 and Memorandum GC 12-01.

1. Can you provide current statistics concerning the number of cases deferred under this policy?

There are currently approximately 1682 cases in deferral status. Of those approximately 600 have Section 8(a) (3) or 8(a) (1) allegations related to discipline. The deferral policy announced in GC11-05 and GC12-01 applies to all deferral cases dealing with 8(a) (3) and 8(a) (1) allegations involving discriminatory discipline.

2. Under what circumstances are cases not being deferred?

Pursuant to GC 11-05, the Acting General Counsel will argue to the Board, in appropriate Section 8(a) (1) or (3) cases, that deferral to an arbitral award is not appropriate unless the party urging deferral demonstrates that (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If that showing is made, deferral will be appropriate unless the award is repugnant, as under the present standard. Pursuant to both GC 11-05 and GC 12-01, the Acting General Counsel's policy is to continue to defer any pre-arbitral case where such deferral is appropriate under *Collyer*, unless it is clear that the grievance will not be arbitrated within a year. In some instances, deferral continues to be appropriate even where a case will not be arbitrated within a year, depending on the circumstances. For instance, if both parties agree that the matter should be arbitrated in an 8(a) (5) situation.

3. Can you provide statistics regarding the number of cases that are not deferred, even if the employer is willing to defer, because there is a determination of no merit? If there are such statistics, how do they compare to the historical statistics regarding dismissals in potential deferral cases?

The Agency does not keep records on the number of potentially deferrable cases that are dismissed or withdrawn following a no merit determination.

4. Are there statistics regarding the number of cases in which the employer refuses to waive the time limits for submitting a grievance to arbitration? What action has been taken in those cases?

The Agency does not maintain records on the number of cases in which the employer refuses to waive time limits for submitting a case to arbitration. Usually employers agree to waive contractual time limits so that the issues underlying the charge can be

submitted to the grievance arbitration procedure. When they do not, the Regional Director makes a determination on the merits of the charge, and either issues a complaint or dismisses the charge based upon that determination. Though it's rare, in some cases, even where the employer refuses to waive the time limits, the charging party may elect to continue pursuing the case through the grievance procedure. In those cases, the RD has the option of deferring the case under *Dubo.*

5. What action, if any, has been taken when a case has not been submitted to arbitration with a year?

If a case involving Section 8(a) (1) or (3) discriminatees has not been submitted to arbitration within a year, the Region will inquire into the circumstances to determine whether continued deferral is appropriate. It will issue a show cause letter to the parties which requires them to state their position regarding the efficacy of continued deferral. The Region also will contact individual discriminatees for their position and advise them that, if they do not respond, the charge may be dismissed. If a charging party union fails to respond but the discriminatee(s) responds and asks that processing of the charge resume, the Region will revoke deferral of the charge and resume processing of the charge, and either issue complaint or dismiss the charge, unless there is a good reason to continue deferral. As yet, there have been no cases where the Acting General Counsel has revoked deferral because of a delay in the arbitration process. For the most part, when apprised of the possibility of revocation of deferral due to arbitral delays, the parties have been successful in expediting arbitration.

6. **How has this deferral policy been applied to grievance settlements? Are there any statistics on this**?

Under the Acting General Counsel's proposed new deferral standards, deferral to a pre-arbitral grievance settlement of a Section 8(a)(1) or (3) case is appropriate only where the parties intended to settle the unfair labor practice charge in addition to the grievance and the settlement conforms with the requirements of *Independent Stave*. Regional Offices have been directed to adhere to the following procedures in applying that policy:

1. If there is a withdrawal request and all parties (including the discriminatees) agree to a withdrawal of the charge, the Region may at its discretion accept the withdrawal request without submitting the case to Advice.

2. If there is a withdrawal request by a Charging Party Union (indicating that the Charging Party intended to settle the charge as well) and the discriminatees do <u>not</u> agree to the withdrawal of the charge, the Region should determine whether the charge has merit and, if so, submit the case to Advice with a recommendation as to whether the settlement complies with *Independent Stave*.

3. If there is no withdrawal request, the Region should determine whether the charge has merit and, if so, submit the case to Advice with a recommendation as to

whether the settlement was intended to resolve the unfair labor practice charge and whether it complies with *Independent Stave.*

7. What impact has this policy had on post-arbitration deferral cases?

Cases presenting the question of whether deferral to an arbitral award is appropriate under the standard proposed in GC 11-05 must be submitted to the Division of Advice. In many of the cases presented thus far, the arbitrator was presented with the statutory issue, and he/she correctly enunciated the statutory principles and applied them. In some cases where the arbitrator did not adequately consider the statutory issue or apply statutory principles, Advice nevertheless authorized deferral to the award because the result was not repugnant (palpably wrong) so the case was not an appropriate vehicle to seek a change in the standard. There are several cases where Advice authorized issuance of a complaint alleging both that the arbitral decision was repugnant and that the standard for deferral in Section 8(a) (1) and (3) cases should be changed. For example, in *IAP World Services*, Advice concluded that an employee was discharged for engaging in protected activity at an employee meeting, that his conduct did not lose the protection of the Act under *Atlantic Steel*, and that the employer had not demonstrated that it would have terminated the employee for other alleged misconduct aside from the protected activity. Advice concluded that the arbitrator's decision upholding the discharge was repugnant (i.e., palpably wrong) and therefore that deferral was not appropriate under *Spielberg/Olin*. In addition, Advice authorized the Region to argue that deferral would not be appropriate under the General Counsel's proposed new standard because the arbitrator did not correctly enunciate the relevant statutory principles and apply them, i.e., he failed to delineate the relevant Section 7 protections, failed to directly address or balance the *Atlantic Steel* factors, and failed to consider the *Wright Line* principles applicable to dual-motive discharges. In its decision in that case, 358 NLRB No. 10 (2012), the Board declined to address the proposed new framework, because it agreed with the ALJ that the arbitrator's decision was not repugnant and that deferral was appropriate. Two cases in which the Acting General Counsel is making similar arguments are currently pending before the Board - *Verizon,* Case 1-CA-44539, and *Babcock & Wilcox,* Case 28-CA-22625.

B. <u>Section 10(j) Injunctions</u>

The Committee is interested in an updated report on the use of Section 10(j) injunctions and the outcome when an injunction is sought.

1. What statistics can you share with us?

<u>Board Authorizations</u>
169 10(j) requests received from Regional offices
- 14 were first contract bargaining cases
- 59 involved discharges during an organizing campaign

The GC sent 60 cases to the Board requesting authorization for 10(j) proceedings

The Board authorized 58 cases (2 were withdrawn from the Board's consideration due to developments in the cases)
The Board did not deny any requests for 10(j) authorization
37 petitions were filed in district courts

Success Rate
Of the 37 petitions filed in district court, 20 were litigated to conclusion by the end of the fiscal year, leading to a success rate of 97%.

20 cases were litigated to conclusion
19 wins (15 full/4 partial)
1 loss
97% success rate

At the end of the FY, of the 58 cases authorized by the Board, 20 were litigated to conclusion, 23 cases were settled, 2 cases were withdrawn due to developments in the case, and 13 cases were pending resolution.

Discharges During an Organizing Campaign
ILB received 59 recommendations from the regions concerning 10(j) relief in cases involving discharges during an organizing campaign.

The General Counsel sent to the Board, and the Board authorized 10(j) proceedings, in 21 cases.

15 petitions were filed in district court seeking the reinstatement of employee(s) discharged during an organizing campaign

Of those petitions filed and resolved during the fiscal year, Regions won in full or in part 10 cases, lost no cases, and obtained settlements and adjustments in 2 cases, for a success rate of 100%. (Two cases were pending at the end of the fiscal year and 1 was withdrawn after an adverse ALJ decision.)

Backpay and Reinstatement Figures
Since 2010 and through the end of last fiscal year, the Agency has obtained settlements in nearly 200 (198) nip in the bud cases. As a result of these settlements 482 discharged employees were offered reinstatement, of whom 209 accepted these offers and the remaining 273 waived reinstatement. The backpay and interest received in these settlements amounted to $3,033,847. These backpay amounts represented an average of 97% of the total amount owed in 2011 and an average of 101% in 2012.

With regard to statistics regarding the median time from the filing of a charge to a settlement, the data we have covers only post 10(j) authorization cases. Since October 2010 there have been 11 such cases. Settlements reached in 2011 were reached in an average of 76 days or 92 median days after the filing of the charge. In 2012 settlements were reached in an average of 173 days or 135 median days after the filing of the charge.

2. **Were there any novel or unusual issues presented in Section 10(j) litigation in the past year?**

The validity of President Obama's appointment of three members to the Board on January 4, 2013, was challenged in many district courts in response to 10(j) petitions. Respondents argued that the Board's authorization of the 10(j) proceeding was invalid because the Board allegedly did not have a valid quorum. Some Respondents also argued that the Board's prior delegation to the General Counsel of the authority to initiate 10(j) proceedings was also invalid, either at its inception or that it lapsed when the Board fell below a quorum. This defense was raised in response to 12 10(j) petitions. In coordination with the Department of Justice, the Regions argued that the district court should avoid reaching the constitutional question of the validity of the recess appointments. The Regions argued that, instead, the court could address whether the Board's delegation to the Acting General Counsel was valid and, if it was, the 10(j) petition was validly authorized. Every court that addressed the issue upheld the validity of the 10(j) petition without reaching the constitutional issue of the validity of the recess appointments. Two of those cases are currently pending appeal in the Second and Sixth Circuits.

C. Investigation Subpoenas

The Committee is interested in recent experience concerning the use of investigative subpoenas.

1. What statistics can you share with us concerning the use of investigative subpoenas?

The attached chart shows the use of investigative subpoenas during fiscal year 2012. During the year Regions issued investigative subpoenas in a total of 666 cases. That total constituted approximately 3.1% of the 21,622 charges filed during the year.

In the 666 cases in which investigative subpoenas issued, Regions reached merit determinations (in whole or in part) in 317 cases; reached nonmerit determinations in 226 cases; and had other resolutions (under investigation; deferral; abeyance, etc.) in 123 cases.

The chart below shows the use of investigative subpoenas during fiscal year 2012.

Region	No. of Cases	Ad Test	Duces Tecum	Total	Merit	Nomerit	Other (Not decided/ Deferred)	Ptn to Revoke	Enf
1	28	23	22	45	12	11	5	3	0
2	44	48	32	80	10	13	21	4	0

3	8	16	34	50	6	2	0	1	0
4	25	17	23	40	10	10	5	0	3
5	17	21	3	24	8	7	2	0	0
6	30	33	17	50	17	12	1	1	1
7	34	49	19	68	12	17	5	2	0
8	8	16	6	22	4	2	2	0	0
9	25	73	15	88	16	5	4	0	0
10	11	32	7	39	4	4	3	1	0
11	23	35	12	47	12	10	1	1	0
12	22	27	14	41	9	12	1	5	0
13	16	27	12	39	5	2	9	1	0
14 & 33	18	34	21	55	7	7	4	3	1
15	42	75	23	98	22	17	3	10	0
16	36	67	9	76	20	15	1	0	0
17	6	5	2	7	3	0	3	0	0
18	8	8	4	12	6	2	0	0	0
19 & 36	22	15	23	38	13	6	3	4	0
20 &37	19	21	16	37	13	6	0	5	0
21	27	41	24	65	13	10	4	9	9
22	29	100	29	129	13	6	10	6	2
24	14	17	16	33	6	6	2	0	1
25	5	8	3	11	3	2	0	1	0
26	2	3	0	3	1	1	0	0	0

27	4	2	12	14	3	1	0	0	0
28	27	67	40	107	18	5	4	3	1
29	16	12	17	29	9	4	3	1	0
30	15	25	7	32	10	4	1	1	1
31	26	33	20	53	11	8	7	8	0
32	53	84	48	132	18	18	17	10	0
34	6	1	5	6	3	1	2	2	0
Totals	666	1,035	535	1,570	317 47.5% 58%	226 34% 42%	123 18.5%	82	19

Key to Reading Chart: The first column lists the Region. The second column shows the number of cases in which investigative subpoenas were issued, by Region. The third and fourth column divides the number of subpoenas issued between subpoenas ad testificandum and subpoenas duces tecum. The fifth column shows the total number of investigative subpoenas, by Region. The sixth, seventh and eighth columns show whether the Region reached a merit (in whole or in part), no-merit or other determination in cases involving the issuance of investigative subpoenas. The seventh column shows the number of cases in which a petition to revoke was filed, and the final column shows the number of cases in which a Region filed a court enforcement action. The figures do not include compliance cases.

Total C-case Filings FY 12 – 21,622 cases.

In 3.1% of cases filed an investigative subpoena issued.

2. To what extent have the subpoenas been effective in making a merit determination?

There is no definitive basis for measuring the extent to which investigative subpoenas have been effective in assisting Regions in making merit determinations. It is the Agency's view that having more relevant evidence aids Regions in reaching sound merit determinations.

3. How frequently have investigative subpoenas been used to obtain testimony as opposed to documents?

During fiscal year 2012 Regions issued a total of 1,570 investigative subpoenas. With regard to the type of subpoenas issued, Regions issued 1,035 subpoenas ad testificandum and 535 subpoenas duces tecum.

4. How frequently has a petition to revoke been filed?

During fiscal year 2012 there were 96 petitions to revoke filed in cases involving the issuance of investigative subpoenas.

5. What statistics can you provide concerning the outcome when a petition to revoke is filed?

During fiscal year 2012 the Board ruled on 57 petitions to revoke filed in connection with investigative subpoenas. In two instances the Board granted in part and denied in part the petitions to revoke; in 6 instances the petitions to revoke were denied as untimely; and in the other instances the Board denied the petitions to revoke on the merits.

6. What effect does the use of an investigative subpoena have on the length of the investigation?

The Agency does not have any measure for determining the effect of the use of an investigative subpoena has on the length of an investigation. It is widely accepted within the Agency that the issuance of an investigative subpoena usually extends the length of an investigation to some degree. However, it is also widely accepted that the evidence obtained using investigative subpoenas enhances the soundness of determinations reached. Reaching sound determinations avoids unnecessary litigation and enhances settlement prospects.

7. **Are there any circumstances in which an investigative subpoena is used after a determination to issue a complaint has been made?**

Investigative subpoenas are not utilized to investigate allegations for which a Region has reached a merit determination.

D. <u>Affidavits</u>

Is there any policy or guidance about whether witnesses (affiants) should be instructed to keep their affidavit confidential?

Section 10060.9 of the ULP Casehandling Manual sets forth the guidance Board agents should provide witnesses about the confidentiality of their affidavits.

Section 10060.9 states in relevant part:

Immediately at the conclusion of the affidavit session, or as soon thereafter as practicable, the Board agent should:

- Give a copy of the signed affidavit to the witness and obtain written acknowledgement of receipt

- Advise the witness that the affidavit is being provided so that he/she can further review it and advise the Region of any inaccuracies or omissions

In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his/her attorney or designated representative (i.e., one who is entitled under the General Counsel's policy to be present during the affidavit interview (Sec. 10058) whether or not such person was actually present during the interview).

E. Default Language

In GC Memorandum 11-04 (issued January 12, 2011), the Acting General Counsel gave guidance that certain default language should be incorporated in informal settlement agreements.

1. Can you provide current statistics about the number of cases settled with and without the default language?

The NxGen Case Management System does not track the inclusion of default language in settlement agreements given that our policy is that such language should be routinely included.

2. What impact, if any, has this had on settlement rates?

We do not believe there has been an impact on the national settlement rate. The national settlement rates decreased by 2% in 2011 and remained steady in 2012 from the rate seen in the previous two years of 94.0%. This fiscal year, the settlement rate is up slightly from the previous two years by 1.3%. The settlement rates for this fiscal year to date and the previous four years are detailed below:

2009 Settlement Rate: 94.0%
2010 Settlement Rate: 94.0%
2011 Settlement Rate: 92.0%
2012 Settlement Rate: 92.0%
2013 Settlement Rate (as of January 31, 2013): 93.3%

3. **Under what circumstances is the default language not included in the settlement agreement?**

It is our policy that default language should be routinely included. There have been a handful of situations where ALJs have accepted settlements without default language over the counsel for General Counsel's objections. In two of those cases the GC took special appeals to the Board and the Board approved the settlement.

Regions can also contact the Division of Operations-Management for authorization to accept settlements without default language. On very rare occasions Operations-Management has okayed proceeding with settlement without the language.

In *Wal-Mart Stores, Inc.*, Case 05-CA-086121, ALJ Rosenstein approved a settlement agreement without the default language over the objections of Counsel for the Acting General Counsel and the Charging Party on January 11, 2013. For reasons unconnected to the default language the Region has decided not to file a special appeal to the ALJ's approval.

In *APWU*, Case 05-CB-082608, ALJ Rosenstein approved a settlement agreement that did not contain the default language on November 1, 2012. Counsel for the Acting General Counsel neither agreed to nor opposed Respondent's proposed non-board settlement. This case is now in compliance.

In *USPS,* Case 07-CA-070056, ALJ Shamwell approved Respondent's version of a Board informal Settlement Agreement with which the Charging Party had agreed. Counsel for the Acting General Counsel objected to its approval on several bases, including that Respondent had eliminated the default language. On May 15, 2012, Counsel for the Acting General Counsel filed a Request for Special Permission to Appeal because the ALJ's approval of the altered settlement undermines the policy of the General Counsel ensuring that a respondent complies with its settlement obligations; that the charging party receives a timely remedy; and all avoid the costs and delays associated with subsequent litigation of issues and allegation that are settled. Respondent filed its Opposition to Request for Special Permission to Appeal on June 6, 2012, and the Board issued its decision on July 2, 1012 denying the special appeal and agreeing with the ALJ that the agreement meets the standards set forth in *Independent Stave Co.,* 287 NLRB 740, 741 (1987). The case is closed.

In *Cooper Crouse-Hinds*, Case 16-CA-075281, ALJ Marcionese approved the settlement on the record on November 26, 2012 without default language and over the objection of Counsel for the Acting General Counsel. The case is in compliance.

In *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, Case 28-CA-023267, ALJ Biblowitz, approved Respondent's version of an informal Settlement Agreement with which the Charging Party had agreed. Counsel for the Acting General Counsel objected to its approval on several bases, including that Respondent had eliminated the default provision and altered the standard Board Notice language for the violations. Counsel for the Acting General Counsel took a special appeal to the Board. On November 18, 2011, the Board denied the special appeal on the merits but did not specifically address the default language issue. This case has closed on compliance.

Bakery, Confectionery, Tobacco Workers and Grain Millers Local 65, Case 17-CB-006633, involved a non-Board settlement that was accepted by ALJ Cracraft in an Order dated July 22, 2011 after the ALJ determined that Respondent's settlement met

the criteria of *Independent Stave*. (The ALJ considered the non-board settlement to be in the "nature of a consent order"). Counsel for the Acting General Counsel neither agreed to nor opposed Respondent's proposed non-board settlement. The Charging Party objected to the non-board settlement basically because the Charging Party wanted a posted notice pursuant to an informal board settlement rather than the mailed notice on Union letterhead that was provided for in Respondent's non-board settlement proposal ultimately approved by the ALJ. Counsel for the Acting General Counsel chose not to expressly enter into Respondent's proposed non-Board settlement because of the Charging Party's opposition, and the Acting General Counsel's preference for an informal board settlement, which would include inter alia default language.

4. Under what circumstances is the default language modified?

In GC 11-04, the Acting General Counsel instructed the Regions to "routinely include default language in all informal settlement agreements and all compliance settlement agreements". The Acting General Counsel subsequently issued GC 11-10 *Clarification of GC 11-04* modifying the default language in light of questions about the meaning of the term "ex parte" and providing that the motion is actually for a default judgment rather than a summary judgment. In addition, GC 11-10 announced that if there is a substantial basis to vary from this policy, a Regional Director should consult with his or her Assistant General Counsel or Deputy in the Division of Operations-Management to seek clearance to do so. This remains the Agency's policy with respect to default language.

The Acting General Counsel's clear preference is to include default language in all informal settlements. However, on a case-by-case basis, Directors have been given discretion to enter into agreements that contain a temporal limit on enforcing the default language for a defined period (of not less than 6 months) if the Region is confident that the chances of default are low. In addition, in settlements involving multi-site employers, Directors have been given the discretion to limit the provisions of the default language to a particular location, where the recent ULP activity occurred.

5. Have there been any recent cases in which the Region has claimed that the default language has been breached? If so, what can you tell us about the circumstances of those cases, including the outcome?

In *Bradford Printing & Finishing, LLC and New England Joint Board, UNITE-HERE*, Cases 01-CA-046524, 01-CA-046545, 01-CA-046631, and 01-CA-046657, Counsel for the Acting General Counsel filed a Motion for Default Judgment of Respondent's obligations under the installment schedule, agreed to by the Regional Director along with a consolidated complaint alleging additional violations of the Act. On September 13, 2012, the Board approved the motion for default and ordered the Respondent to comply with the terms of the settlement agreement approved by the Regional Director on November 3, 2011, by paying to the Region the remaining backpay obligation in the sum of $109,970.71, with interest at the rate prescribed in *New Horizons for the*

Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent is in receivership. The enforcement of the Board's Order for 01-CA-046524, et al., 358 NLRB No. 131 (2012), is pending before the U.S. Court of Appeals for the First Circuit.

In *Teamsters Local 107 (Eureka Stone Quarry, Inc. d/b/a JDM Materials Company)*, Cases 04-CB-084647 and 04-CC-082835, the Acting Regional Director approved an informal settlement agreement in the fall of 2012 with default language. Shortly after that approval, the Union engaged in additional 8(b) (1) (A) conduct as alleged in Cases 04-CB-090533 and 04-CB-092643. The Region revoked the informal settlement agreement and in late January arrived at a formal settlement agreement covering the previously settled allegations and the two new incidents.

In the *Union of Union Staff*, Case 07-CA-079543, Counsel for the Acting General Counsel issued complaint on November 30, 2012 after a breach of the default language of the settlement agreement. This was followed by the Region filing a Motion for Default Judgment on December 19, 2012. The case is pending before the Board.

In *New Link LTD, Inn Site, Inc., and Cherlayne, Inc., single employer, and Detroit Center for Care, LLC, joint employer*, Case 07-CA-053651, the complaint was reissued on January 19, 2012 after a breach of the default language of the settlement agreement. On February 13, 2012, Counsel for the Acting General Counsel filed a Motion for Default Judgment. On April 6, 2012, the Board issued its Decision and Order, which was reported at 358 NLRB No. 26, approving the motion for default judgment. On August 9, 2012, the U.S. Court of Appeals for the Sixth Circuit summarily enforced the Board's Decision and Order. The Region has recommended the institution of civil contempt proceedings.

In *Long Mechanical, Inc.*, Cases 07-CA-052917, 07-CA-053146, and 07-CA-053200, the consolidated amended complaint was reissued on October 7, 2011 after a breach of the default language of the settlement agreement. On October 10, 2011, Counsel for the Acting General Counsel filed a Motion for Default Judgment. On August 9, 2012, the Board issued its Decision and Order, which was reported at 358 NLRB No. 98, approving the motion for default judgment. On December 27, 2012, the Board filed an Application for Summary Entry of a Judgment enforcing the Board's order.

In *Peterman, LTD*, Case 09-CA-085396, the Region determined that Respondent had violated the December 8, 2011 settlement agreement obtained in Cases 09-CA-062183 and 09-CA-067004. On September 18, 2012, Counsel for the Acting General Counsel filed a Motion for Default Judgment. However, the case settled before a ruling issued by the Board. By Order dated December 28, 2012, the charge was withdrawn and the Complaint and Notice of Hearing was withdrawn and the case closed after compliance was achieved.

In *ConAgra Foods, Inc.*, Cases 09-CA-062889, 09-CA-062899 and 09-CA-068198, Counsel for the Acting General Counsel filed an Order Consolidating Cases and

Consolidated Complaint on January 17, 2013. The Region alleges that Respondent is in default of the November 30, 2011 settlement agreement.

In *Headwaters Resources, Inc.*, Cases 09-CA-082120, the Acting General Counsel issued complaint on July 27, 2012. A settlement agreement was reached on August 8, 2012. The Region decided to file a Motion for Default Judgment, but has delayed filing as it appears that the case is likely to settle.

Stagetech Productions, LLC, Case 10-CA-080536, the Acting General Counsel issued a Complaint and Notice of Hearing on July 26, 2012. Soon thereafter, the parties entered into an informal settlement agreement. When the Respondent failed to comply, in full, with the terms of the settlement, the Acting General Counsel reissued the Complaint and on January 13, 2013 the Region filed a Motion to Transfer the Case to and Continue Proceedings Before the Board and a Motion for Default Judgment. This case is pending before the Board.

In *Ten West Apparel, Inc.,* Case 22-CA-069363, the Charging Party Union alleged that the Employer had unlawfully discharged the Union's main organizing drive supporter after the employee had been reinstated pursuant to a prior settlement agreement (Cases 22-CA-22-029969, 22- CA-029991, and 22- CA-030015). The *nip-in-the-bud* discharge occurred during the early stages of an organizing drive. The Acting General Counsel issued Complaint on the discharge allegation, and the Region reinstated all prior settled allegations in accordance with the default provision of that settlement agreement.

In *Altura Concrete Corporation*, Case 22-CA-075740, 359 NLRB No. 57, the Acting General Counsel sought a default judgment pursuant to the terms of a bilateral informal settlement agreement. The Board found that the Respondent had violated the Act by discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization. This case is in compliance.

In *Aramark Uniform & Career Apparel, LLC*, 14-CA-063136, Counsel for the General Counsel intends to move for default judgment of the November 8, 2011 settlement agreement for Respondent's non-compliance with settlement if the Employer does not settle Case 25-CA-087501.

In *Casino One Corporation d/b/a Lumiere Place Casino & Hotels*, Cases 14-CA-30212, 14-CA-30219, 14-CA-30237, and 14-CA-30301, the Region obtained an informal settlement with default language on April 28, 2012. In subsequent cases, 14-CA-066026 and 14-CA-071525, the Region determined that the Employer engaged in very similar types of unlawful conduct. The Acting General Counsel then reissued the consolidated complaint in Cases 14-CA-030212, 14-CA-030219, 14-CA-030237, and 14-CA-030301 and asserted Respondent violated the settlement agreement by engaging in the same type of unlawful conduct in Cases 14-CA-066026 and 14-CA-071525. The Acting General Counsel also sought a remedy for the default cases of

100% back pay rather than the 80% paid pursuant to the settlement. Thus, the Region intended to litigate Cases 14-CA-066026 and 14-CA-071525 before the ALJ and then seek a finding that the similar violations violated the previous settlement and requested the ALJ refer Cases 14-CA-030212, 14-CA-030219, 14-CA-030237, and 14-CA-030301 to the Board for default judgment. Counsel for the Acting General Counsel filed a motion to the ALJ to that effect on April 9, 2012. The Region procured a formal settlement in the subsequent cases 14-CA-066026 and 14-CA-071525, and agreed to drop the motion for default judgment and 100% backpay.

In *Veolia Transportation Services, Inc. (Phoenix Division)*, Case 28-CA-023249, the Acting General Counsel filed a Motion for Default Judgment on March 9, 2012 based on violations of the terms of an informal settlement agreement. Respondent filed its Opposition to the Motion for Default Judgment on March 14, 2012 on the grounds that it entered into a non-Board settlement with the Charging Party. On March 30, 2012, the Acting General Counsel filed a withdrawal of its motions because the parties had reached a non-Board settlement. The withdrawal was approved on April 5, 2012. The case is closed.

Kaiser Foundation Hospitals, *Southern California Permanente Medical Group*, Case 31-CA-089179, involves the breach of settlement agreement in prior cases involving the Respondent (Cases 31-CA-073526 and 31-CA-079487). The Region issued the 14-day default letter but has not issued complaint at this time. Respondent promptly executed the settlement agreement in the instant case on January 3, 2013. The Region is monitoring compliance at this time.

SEIU-UHW-W (Kaiser Permanente), Case 31-CB-081632, involves Respondent's non-compliance with terms of the August 24, 2012 settlement agreement. The Region issued the 14-day default letter on December 10, 2012, but has not issued complaint at this time because Respondent appears to have now complied with terms of settlement agreement. The Region is monitoring compliance at this time.

Vocell Bus, Case 01-CA-045915, was litigated before the Board and the case was remanded as the Board found that there was a factual issue regarding whether there was a breach of the settlement agreement. The parties ultimately reached a settlement that provided in the event of noncompliance entry of an uncontested Board order and entry of a Court judgment. The Respondent complied in full with the terms of the final settlement.

In *Rogan Bros., Case* 02-CA-040028, the Counsel for the Acting General Counsel moved for Summary Judgment after the settlement with default language was breached. The Board issued an Order granting the motion. The Board's order was enforced by default in *NLRB v. Rogan Brother Sanitation, Inc.,* No. 12-236 (2^{d} Cir. 2012). The Respondent has refused to comply with the Court's judgment and contempt has been recommended.

Premier Investigative Services, Case 05-CA-035865, 357 NLRB #113 (2011) involved a default settlement that was approved prior to the issuance of GC Memorandum 11-04 settling the allegation that it had failed to provide employees with their retroactive wage increase. The Board granted the Acting General Counsel's Motion for Summary Judgment on November 18, 2011. The Board's order was summarily enforced in *NLRB v. Premier Investigative Service Agency, LLC,* NO. 12-1939 (4th Cir.). The case is in compliance. The Respondent has refused to comply with the Court's judgment.

In *Stagetech Productions, LLC*, Cases 11-CA-022813 and 11-CA-023147, the parties settled allegations in Case 11-CA-22813 that included a number of independent Section 8(a)(1) violations and 8(a)(3) refusal to hire allegations. In a subsequent charge, Case 11-CA-23147, the Region found merit to allegations that the Respondent again unlawfully refused to hire the discriminatees and devised a discriminatory referral list. Complaint has issued on the consolidated cases, alleging breach of the prior agreement. Respondent filed answers to the consolidated complaint and amended consolidated complaint, but it subsequently withdrew its answers. The Acting General Counsel filed a default motion with the Board which was granted on August 31, 2012. The Board filed for summary entry of judgment enforcing the Board's Order with the U.S. Court of Appeals for the Fourth Circuit. The court enforced the Board's order on December 26, 2012. The case is in compliance.

F. Dismissal Letters

Is there a policy or guidance concerning the use of "short form" vs. "long form" dismissal letters?

If a charging party declines to withdraw any non-meritorious charge allegation, a long form dismissal letter that fully sets forth a detailed explanation for dismissal will issue, unless the charging party rejects the detailed explanation. If the charging party rejects the detailed explanation a short form dismissal letter will issue. See, NLRB Casehandling Manual Part One Unfair Labor Practice Proceedings, Sections 10120.2 and 10122.1 -10122.2.

G. Social Media and Handbook/Policy Cases

1. We understand that social media cases are no longer mandatory submissions to Advice, but are there any other categories of cases involving employer policies or handbooks that must be submitted to Advice?

Cases involving rules for use of an employer's email/computer systems (*Register-Guard*) are mandatory Advice submissions. Cases involving social media rules or handbook provisions (e.g., at-will clauses) must be submitted to Advice if they raise new or difficult issues not covered by previously-issued Advice memoranda.

2. The committee believes that the May 30, 2012 report concerning social media cases, which include a policy that was found to be lawful under the Act,

was very helpful. Is the Acting General Counsel contemplating issuing any reports or further guidance in cases involving social media, at-will employment, confidentiality, or other policies?

There are no immediate plans to issue another General Counsel report concerning social media policies or other employer rules/policies. If a significant number of Advice Memoranda issue addressing new questions in this area, we will consider issuing another report. In the meantime, Advice memoranda are posted on the Agency website within a couple of weeks of issuance of an Advice memorandum authorizing dismissal or, if complaint is authorized, within a couple of weeks after case closure.

3. In the context of settlement, are there circumstances in which specific policy language will be approved?

If there is a simple, clear-cut way to modify unlawful language in an employer policy so as to make it lawful, the Division of Advice and the Regional Offices generally are willing to approve new language in the context of settlement. For example, in a recent memorandum, Advice authorized settlement of an unlawful *Banner Health* rule with the addition of a few words that limited the employee's obligation to maintain confidentiality to only those employer investigations where such confidentiality was reasonably required. (*Verso Paper*, 30-CA-089350, Advice memorandum dated Jan. 29, 2103).

4. The *24 Hour Fitness* case attracted a lot of attention. How many other pending cases involve *D.R. Horton* issues? Do those cases present any new issues – e.g., arbitration agreements that are not a condition of employment? What remedies are being sought in those cases?

There are 29 pending cases (counting all related cases as a single case) that present *D.R. Horton* issues. *D.R. Horton* Cases Pending on Appeal Before Board include:

Advanced Services, Inc., 26-CA-063184
Convergys Corporation, 14-CA-075249
Waterstone Mortgage Corporation, 30-CA-073190
Murphy Oil USA, Inc., 10-CA-038804

Of those cases pending at the Agency, some of these present new issues, e.g., voluntary ("opt-in") agreements that the Acting General Counsel is alleging are unlawful because they waive employees' future rights to engage in collective activity. Remedies being sought in *D.R. Horton* cases include an order that requires the employer to cease and desist from soliciting or maintaining its unlawful arbitration agreement, to affirmatively rescind the unlawful agreement, to notify all employees subject to the unlawful agreement of the rescission, and to post a notice at all locations where the unlawful agreement has been in effect. In appropriate cases, the Acting General Counsel is also seeking to have the employer make whole any employee for an incentive payment lost, or benefit denied, because he or she refused to sign the unlawful agreement. In cases where employers have filed judicial motions seeking to

compel individual arbitration, the Acting General Counsel has sought reimbursement of the employees for any litigation expenses directly related to opposing the unlawful motion to compel, and has sought to require the employer to move the court to vacate any order compelling individual arbitration if a motion to vacate could be timely filed.

H. Remedies

1. To what extent are special remedies being sought in Section 8(a) (1) and (3) cases in the context of an organizing campaign?

Pursuant to Memorandum GC 11-01, the Acting General Counsel is seeking, and the Board is authorizing, more effective remedies in all cases involving a discharge during an organizing campaign. At a minimum, most cases seek an order requiring that a responsible management official read the notice to assembled employees or, at the respondent's option, have a Board Agent read the notice in the presence of a responsible management official. This remedy is not sought only in those situations where it would not be feasible to assemble employees. Regions have been successful obtaining the notice reading requirement both from district courts and in settlements. In a few cases where the unfair labor practices have interfered with the employees' right to freely learn about unionization from their co-workers or a union representative, the Acting General Counsel has sought and obtained an order (or settlement) requiring the Employer to permit union access to its bulletin boards and/or to provide the union with an updated list of employees' names and addresses.

2. In cases involving a local operation of a national employer or a local union affiliated with a national/international union, under what circumstances will remedial orders and notice posting obligations be sought against the national entity?

Under well-established precedent, the Acting General Counsel seeks a "nationwide" remedy where an unlawful rule or policy is maintained company-wide or by an International union (e.g., an unlawful rule in the company's employee handbook or an international's unlawful *Beck* policy). Nationwide remedial orders may also be appropriate when an unlawful local act was directed by corporate management or by the international union.

II. REPRESENTATION CASES

A. Electronic Voting

Two years ago, the Committee conducted a discussion on the feasibility of electronic voting in Board elections. Last year, the Board formally requested information from possible vendors.

1. Have there been any further developments on electronic voting? No.

2. Has the Board come to any conclusions regarding this election method?
No.

B. Mail Ballots and Off-Site Elections

At several regional meetings, Committee members expressed interest in the Board's present practices in utilizing mail in lieu of manual ballots, and pursuing off-site elections.

1. Is the Board contemplating any change in its policies concerning mail ballots?

2. What are the Board's policies regarding off-site elections? If members pursue an off-site election, what is the likelihood of the agency granting such requests?

The Board has accorded Regional Directors wide discretion on when and where to hold an election. Section 11302.2 of the Board's *Casehandling Manual, Part Two, Representation Proceedings (CHM)* provides that "the best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there."

However, there are some circumstances in which the Regional Director may determine that an off-site election is warranted, such as where there are egregious or pervasive employer unfair labor practices which may compromise voter free choice if the election is held on the employer's premises. See *CHM,* Section 11302.2. Further guidance may be found in two published decisions, *Austal USA, LLC,* 357 NLRB No. 40 (August 2, 2011) (Liebman, Becker, Pearce), and *Two Sisters Food Group,* 357 NLRB No. 68 (December 29, 2011) (Pearce, Becker; Hayes dissenting in pertinent part). Both cases involved rerun elections.

As to the likelihood of such elections being directed in a particular case, it is left to the Regional Director's discretion, as indicated above.

3. What statistics can you share with us concerning the use of mail ballots and holding off-site elections?

In 2012 the Agency conducted 174 mail ballot elections and 18 mixed manual and mail ballots elections. In 2012 there were 1680 elections held. In FY 2011 there were 141 mail ballot elections, 25 mixed manual and mail ballot elections and a total of 1694 elections held.

4. Under what circumstances will a request for a mail ballot or off-site election be granted over one party's objection? What procedure is available to the objecting party?

The Board's policy in directing mail ballot elections is set forth in the Board's Casehandling Manual, Part Two, Representation Proceedings, Section 11301.2. See also, *Outline of Law and Procedure in Representation Cases,* Sec. 24-427. In *San Diego Gas & Electric,* 325 NLRB 1143 (1998), the Board announced the factors it expected its Regional Directors to consider in deciding whether or not to direct a mail-ballot election:

1. Where eligible voters are "scattered" because of their job duties, over a wide geographic area;

2. Where eligible voters are "scattered" in the sense that their work schedules vary significantly so that they are not present at a common location and common times; and

3. Where there is a strike, a lockout or picketing in progress.

With respect to off-site elections, the Board has accorded Regional Directors wide discretion on when and where to hold an election. Section 11302.2 of the Board's *Casehandling Manual, Part Two, Representation Proceedings (CHM)* provides that "the best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there."

However, there are some circumstances in which the Regional Director may determine an off-site election is warranted, those circumstances are described above in response to II B 2.

As to the likelihood of such elections being directed in a particular case, it is left to the Regional Director's discretion, as indicated above.

The objecting party may file a request for special permission to appeal the Regional Director's determination to grant or deny a request for a mail ballot or off site election.

5. Under what circumstances will a mail ballot or off-site election *not* be held even if both parties agree to such an election?

As noted in II.B. 2 and 4 above, Regional Directors ultimately have discretion in making the initial determination regarding the appropriate method and location for initial and rerun elections. While consideration of the parties' desire is appropriate, that factor is not solely dispositive of whether a mail ballot or off-site election will be conducted. See CHM Part Two, Section 11301.2.

C. <u>Election Procedures</u>

The Board's recent effort to promulgate revised election rules is presently stalled in the courts.

1. Could you share any information on the status of the litigation and the enjoined rule?

On December 22, 2011, the Board published a final rule amending its representation procedures. *Representation—Case Procedures*, 76 Fed. Reg. 80138. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in the U. S. District Court for the District of Columbia challenging the rule. The Plaintiffs argued, inter alia, that the Board lacked a quorum to issue the rule and that its procedural changes violate the NLRA and the U.S. Constitution. The parties filed cross-motions for summary judgment and opposition pleadings.

In *Chamber of Commerce v. NLRB*, --- F.Supp.2d ----, 2012 WL 1664028, 193 LRRM 2316 (D.D.C. May 14, 2012), the district court struck down the rule as invalid because only two members voted for the rule and Member Hayes did not cast a vote. On June 11, 2012, the Board filed a motion to alter or amend judgment under FRCP 59(e), asking the Court to reconsider its ruling. The district court denied reconsideration on July 27.

The Board appealed to the D.C. Circuit (No. 12-5250). The appeal argues that the Board validly issued the final rule on the basis of the affirmative votes of Chairman Pearce and Member Becker cast on December 16 and Member Hayes' decision to abstain from dissenting at that time which he conveyed to his colleagues on December 15. The Board explained that the imminent loss of a Board quorum justified the Board's crafting a new procedure that gave Member Hayes the option, which he elected, to refrain from dissenting at the time the majority agreed to publish the final rule and instead to express his objections to the rule in a later dissent. Contrary to the holding of the district court, because Member Hayes definitively expressed his decision to abstain on December 15, he was not obliged to repeat himself on December 16 in order to satisfy NLRA Section 3(b). The appeal is fully briefed and awaiting oral argument on April 4, 2013.

On January 30, 2013, the Chamber of Commerce submitted a FRAP 28(j) letter citing *Noel Canning* v. *NLRB*, No. 12-1115 (D.C. Cir. January 25, 2013). The Chamber argued that *Noel Canning* provides an additional independent ground to affirm the district court's decision, since under its reasoning Member Becker's recess appointment on March 27, 2010 was unconstitutional. Therefore, the Chamber argued, even if Member Hayes participated, there still was no valid quorum for the election procedures rule.

The D.C. Circuit has decided to hold all matters in which Member Becker participated in abeyance.

2. Does the Board have any plans to institute temporary rulemaking during the pendency of the litigation?

The Board is continuing to work on the aspects of the proposed changes to representation-case procedures that were not disposed of in the December 2011 final rule. It is anticipated that any further amendments will be promulgated in the form of a final rule, but no final decision has been made at this time.

3. Is the Board considering any new initiatives or internal procedural changes regarding the time between the filing of the petition and the election? Regarding special appeals and requests for review of RD decisions?

No, other than in connection with the 2011 notice of proposed rulemaking.

4. What statistics can you share with us concerning the Board's processing of election petitions during the last reporting year? In particular, has there been any noticeable trend in parties' willingness to conduct quick elections?

We are pleased to report that the field has continued to conduct elections in a very timely manner. In FY 2012, 93.9% of all elections were conducted within 56 days of the filing of the petition. This compares with 91.7% in FY 2011. 90% of our elections were held pursuant to an agreement of the parties and the median to an election from the filing of a petition was 38 days.

D. Bargaining Unit Determinations

In *Specialty Healthcare*, the Board reexamined its application of traditional community of interest criteria in determining an appropriate unit in contested cases.

1. What has been the experience of the Regions in applying *Specialty Healthcare* to unit determinations?

Regional offices report that *Specialty Healthcare* issues have arisen in a relatively small percentage of the representation cases filed. Not all Regional offices have received petitions raising *Specialty Healthcare* considerations. Regional offices note that representation case decisions are very fact-specific, but they report no difficulties or problems when applying *Specialty Healthcare's* analytical framework in contested representation cases.

2. **What effect has the *Specialty Healthcare* standard had on R-case processing?**

The Regional offices consistently advise that *Specialty Healthcare* has had minimal or no discernible effects on their processing representation cases.

We do not believe it has generally affected the time in processing R cases or the percentage of R cases in which review has been granted.

3. Are there any recent decisions or pending requests for review that you can mention which highlight the application of *Specialty Healthcare*?

Published Board decisions:

Odwalla, Inc., 357 NLRB No. 132 (December 9, 2011) (Pearce, Becker; Hayes concurring), finding that a unit excluding merchandisers from route sales drivers, relief drivers, warehouse associates, and cooler technicians, was not appropriate.

Northrop Grumman Shipyard, 357 NLRB No. 163 (December 30, 2011) (Pearce, Becker; Hayes dissenting), summary judgment granted sub nom. *Huntington Ingalls, Inc.,* 358 NLRB No. 100 (2012), finding a departmental unit of radiological control technicians, calibration technicians, laboratory technicians, and RCT trainees to be appropriate.

DTG Operations, Inc., 357 NLRB No. 175 (December 30, 20II)(Pearce, Becker; Hayes dissenting), finding a petitioned for unit of rental service agents and lead service agents at an airport rental car facility to be appropriate, excluding return, lot, service, fleet, and exit booth agents, among others.

Pending Requests for Review:

The Neiman Marcus Group, Inc., d/b/a BergdorfGoodman, 2-RC-076954 (review granted 5/30/12 (Hayes, Griffin, Block)). The ARD found a unit of women's shoe sales associates at a department store to be appropriate, excluding other selling employees.

Macy's, 1-RC-091163 (review granted 12/4112 (Pearce, Griffin, Block)). The ARD found a unit of cosmetic and fragrance sales employees at a department store to be appropriate.

DPI Secuprint, Inc., 3-RC-012019, (review granted 6/10111 (Pearce, Becker Hayes)). The ARD found appropriate the petitioned-for unit of pre-press, digital press, bindery and shipping/receiving employees at a facility in upstate New York.

4. Has there been any instruction to the Regions about submitting issues of supervisory status to Advice?

GC Memorandum 11-11, "Mandatory Submissions to Advice", provides in pertinent part the following mandatory submissions to Advice:

Issues identified in GC Memorandum 07-05, Guideline Memorandum concerning Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006):

a. Whether, in the healthcare industry, a charge nurse's consideration of factors other than the training or skills of the healthcare provider and the acuity of the patient demonstrates the use of independent judgment.

b. Cases involving the supervisory status of rotating supervisors.

There are no other instructions to Regions about submitting issues of supervisory status to Advice.

III. ADMINISTRATIVE MATTERS

A. What are the most recent statistics on the agency's performance against its internal goals and time targets?

The Agency exceeded two of its three ambitious overarching goals and came close to achieving the third, closing 84.5% of all representation cases within 100 days (target 85.2%), 72.7% of all unfair labor practice cases within 120 days (target 72.0%), and 83.8% of all meritorious unfair labor practice cases within 365 days (target 80.3%). The target for each 2012 overarching goal was higher than in FY 2011 and the goal for the percentage of meritorious unfair labor practice cases closed within 365 days of the filing of the charge has been increased for FY 2013.

Thus far in 2013, the Agency is exceeding all goals. The Agency is surpassing its 85.2% goal of closing all representation cases within 100 days by closing 86.6% of all representation cases within that time frame. The Agency is closing 72.2% of all cases in 120 days (Goal is 72%). Finally, the Agency is currently closing 82.7% of all meritorious C cases in 365 days slightly exceeding its 82% goal.

B. What is the status of the agency's budget for this and next fiscal years? Does the agency contemplate any changes or shortfalls in its budget?

As to FY 2013, the Agency is currently operating under a Continuing Resolution (CR) through March 27, 2013. The Agency continues to develop plans to address the 5% ($14,000,000) budget reduction which was announced through the Sequestration Order, on March 1, 2013.
As to FY 2014, the President has not yet submitted the budget request for our Agency to Congress. We will be developing plans for FY 2014 as we receive more information about our budget .

C. What is the current status of the agency's reorganization of its regions? Is the agency contemplating any additional changes? How does the decline in caseload affect each region? Was the agency's outreach to this Committee and other groups useful or beneficial in determining which areas should be consolidated?

As you know a number of Regions were permanently restructured effective December 10, 2012. Those Regions are: Regions 10 (Atlanta), 11 (Winston-Salem) and the Nashville Resident Office (formerly a resident office of the former Memphis regional office); Regions 14 (St. Louis) and 17 (Kansas City); Region 25 (Indianapolis) and the Peoria Sub Regional Office (formerly part of the St. Louis office); Regions 1 (Boston) and 34 (Hartford); and Region 15 (New Orleans) and Region 26 (Memphis and its Little Rock Resident Office).

The decline in caseload affects each office differently. Clearly if the caseload in one of the smaller offices declines significantly, that could warrant consideration of restructuring down the line.

The Agency's outreach to the ABA P & P Committee, local P & P Committees and stakeholders was very helpful in our analysis and final determinations about consolidations.

There are no definite plans to engage in further restructuring at this time. Having said that, there are two Regional Directors who have decided to retire in the spring and have made those decisions public. They are the Directors in Milwaukee and Puerto Rico. Consistent with your restructuring protocol, Operations-Management will be reviewing the caseloads in Milwaukee and Puerto Rico as well as the adjacent regions and will be making recommendations to the General Counsel with regard to restructuring in the near future.

D. What is the status of the litigation concerning the notice posting rule? Does the Board have any plans to institute temporary rulemaking during the pendency of the litigation?

On December 22, 2010, the Board published a Notice of Proposed Rulemaking in the Federal Register, 75 Fed. Reg. 80,410. In the notice, the Board proposed requiring all employers within its jurisdiction to post a government-provided free notice of NLRA rights. The Final Notice of Proposed Rulemaking issued August 30, 2011, 76 Fed. Reg. 54,006.

Several employer groups promptly challenged the rule in the United States District Court for the District of Columbia. In *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F.Supp.2d 34, 192 LRRM 2999 (D.D.C. 2012), the District Court for the District of Columbia upheld the Board's statutory authority to issue the rule, but enjoined two of the rule's three enforcement mechanisms – possible unfair labor practice liability under Section 8(a) (1) and possible equitable tolling of the Act's 6 month statute of limitations. The District Court found those two portions of the rule to be severable and it also found that the Board could employ both remedies on a case by case basis. Further, the District Court found the rule did not violate the First Amendment. Finally, the District Court denied certain plaintiffs' motion to supplement their complaints in order to add allegations challenging the President's recess appointments to the Board.

The D.C plaintiffs filed a notice of appeal regarding the District Judge's statutory authority and First Amendment rulings on March 5, 2012 (No. 12-5068). Thereafter, on April 27, 2012, the Board filed a cross-appeal challenging the District Court's rulings limiting the availability of Section 8(a)(1) to enforce the notice posting obligation and its interpretation of the Board's equitable tolling rule (No. 12-5138). These appeals are fully briefed and were argued and submitted to the D.C. Circuit on September 11, 2012.

Separately, the Chamber of Commerce filed a parallel challenge to the notice-posting rule in the United States District Court for the District of South Carolina. In *Chamber of Commerce v. NLRB,* 856 F.Supp.2d 778, 193 LRRM 2026 (D.S.C. April 13, 2012), the District Court for the District of South Carolina rejected the D.C. District Court's approach and found that the Board lacked the requisite statutory authority to promulgate the rule. On June 18, 2012, the Board appealed the ruling of the District Court for the District of South Carolina to the Fourth Circuit (12-1757). That appeal is fully briefed and scheduled for oral argument on March 19, 2013.

E. Does the Board anticipate engaging in more active use of its rulemaking authority? In particular, would rulemaking be appropriate in dealing with social media cases?

The Board does not have under active consideration at this time any substantive rules that have not already been proposed. While there have been suggestions from the public that rulemaking might be appropriate for issues involving social media, no such rulemaking is presently under consideration.

F. How will the new "Designation of Attorney or Representative" policy be implemented throughout the regions in accordance with OM 13-02? Will modifications of the form be permitted?

Section 10058.4(c) of the Unfair Labor Practice Casehandling Manual has long stated that if party counsel claims to represent a third-party witness, "both the attorney and the witness should be directed to provide written notice that the attorney represents the witness, including the filing of a Designation of Representative and a specific Notice of Appearance." Thus, although the Designation Form has recently been revised and reissued, it has consistently been used to assist in determining whether an asserted attorney-client relationship between organizational counsel and a third-party witness is consensual. In addition, the Regions, in consultation with headquarters, have the discretion to use the form, together with a notice of appearance, in any other instance where a Regional Director has concerns about whether an asserted attorney-client relationship is consensual, or concerns about whether an asserted relationship involving a non-attorney representative is consensual. Regarding implementation, as explained in OM 13-02, Regions may give the Designation Form to the attorney, or directly to the witness. However, if it is given directly to a third-party witness whom organizational counsel has claimed to represent, OM 13-02 makes clear that there should be no communication about the substance of the case, which could implicate skip counsel concerns. OM 13-02 also instructs that the Designation Form should be completed in

full by the third-party witness. Whether modifications are appropriate would have to be determined on a case-by-case basis.

G. What is the status of the Board's proposed ethical rules?

Due to limited resources, the Agency has had to give priority to projects other than its Ethics Rulemaking Project. But to bring you up to date on our progress, we have finished identifying which of the ABA's Model Rules of Professional Conduct would be relevant to practice before the Agency, and have identified those rules that would have to be revised to reflect the Agency context and meet Agency needs. Significant drafting has occurred. We also intend to update our review of ethics rules that have been promulgated by other federal agencies. At this point, the Acting General Counsel has not officially reviewed the draft rules, and the Board has not approved them. In addition, because any rules adopted would have to go through notice and comment rulemaking, the Agency's constituents will have the opportunity to provide input.

H. What is the current status of the agency's Office of Public Affairs? Are there any further changes contemplated for the Board's website or mobile applications?

Status of Office of Public Affairs:

The Office of Public Affairs, in conjunction with the Office of the Chief Information Officer, is focused on two website-related initiatives during this time period. One initiative is to optimize the website for use on mobile devices. The other initiative is to increase the usefulness of the existing case pages by providing additional information and documents, including case milestones. While the additional data will be made available in phases beginning this spring, the mobile website is in the early development stage and there is no timetable for its completion.

I. What is the current status of E-filing and NxGen? What is available on NxGen? How will cases be categorized on NxGen?

Ops Currently, parties may e-file through the Agency's website all documents except: Unfair Labor Practice Charges; Representation Petitions; Petitions for Advisory Opinions; and a document that is more than twenty (20) megabytes in size. In FY 2012, the Agency received over 31,000 case-related documents through its electronic filing program. Each filing was routed directly into the NxGen system for processing, which eliminated the requirements for mail handling and scanning and significantly reduced the need for data entry. In 2013, the Agency plans to expand its electronic filing program to enable parties to E-File charges and petitions.

In addition to e-filing, parties will be receiving information about how to register for "E-Service," which is the electronic service of final Board and Administrative Law Judge (ALJ) decisions. Parties who register for E-Service receive, immediately upon posting of the Board's daily E-Docket on its website, an e-mail constituting formal notice of the

Board's or Judge's decision and an electronic link to the decision. They also receive a courtesy e-mail notification from the Board with a link to documents e-filed by another party. This is a courtesy notification only and does not constitute service of the document by the filing party pursuant to Board's Rules & Regulations Sections. In FY 2012, the Agency electronically served and delivered over 500 Board and ALJ decisions to more than 38,000 parties and Agency offices which would have otherwise received printed and mailed copies. The Agency plans to reinstitute signup for electronic service in the first quarter of 2013 and expand E-Delivery to additional documents later in the year.

The NxGen system presently is in use for case processing for all Field Offices, the Office of Appeals, the Regional Advice Branch, the Injunction Litigation Branch, the Division of Judges, and the Board Offices.

Board and ALJ decisions, e-filed documents and other Agency case processing documents, are stored in NxGen, the Agency's case processing system. Some of those documents, such as briefs to the Board and the ALJ, Regional Director representation case decisions, and unfair labor practice case dismissal letters are available on the Agency's website. Cases in NxGen are categorized as representation cases or unfair labor practice cases. Field Offices categorize cases processed in NxGen based on impact analysis categories in the same manner as occurred before NxGen was used.

J.Is there a process for an attorney or representative to enter an appearance for an employer or union on a national level? With this be addressed with NxGen?

In all jurisdictions, the application of the skip counsel rule is triggered by knowledge that a party or person is represented in the matter. Comment 8 to the ABA's Model Rule defines "knowledge" as actual knowledge. For the NLRB, Section 10058.1(b) of the Unfair Labor Practice Casehandling Manual sets forth a mandatory notice of appearance requirement. The Manual specifies that if an attorney or representative wishes to represent a party or a witness in a specific case, a specific Notice of Appearance, Form NLRB-4701 or its equivalent, must be provided. The Agency no longer accepts a general notice of appearance form; instead the case-specific form is intended to clarify whether there is representation in a particular matter, such that the skip counsel rule's protections would apply.

Although an attorney or representative may not enter a notice of appearance on a national level, an Annual Notice for Receipt of Charges and Petitions (Form NLRB-4702) may be filed with a Regional Office. This notice will be honored for the 12-month period specified in the notice, and will result in notification of all matters filed with the Region involving a particular client. Upon receipt of such notification, the attorney or representative may choose to file a notice of appearance in the case.

The Agency is examining methods to enable aggregated representation within NxGen, including for entities with multiple offices and/or locations such as the U.S. Postal Service.